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CURRENT EVENTS.

POWER OF A JUDGE TO OVERRIDE THE VERDICT OF A JURY.—This question has been brought sharply to the attention of the legal profession in England by the recent decision of Mr. Justice Manisty in the Adams-Coleridge libel suit. Although Mr. Justice Manisty seems to have followed a practice which has long obtained in English courts of law, yet there seems to be a doubt whether such a practice is in consonance with the present court rules. This doubt is strengthened by an unreported decision of the Court of Appeal in 1879, in the case of *Perkins v. Dangerfield*, in which it seems to have been held that the rules give no power to adopt such a course as was adopted by Mr. Justice Manisty. The *Law Times* (London), after examining the question at length, and pointing out the difficulties which surround the question, concludes by saying: "All these difficulties seem to show that the framers of the rules never contemplated the practice under consideration, and that the judgment of the Court of Appeal in *Perkins v. Dangerfield* is still binding."

THE SHARON DIVORCE CASE.—This case, which has been exciting public interest, and furnishing rich food for sensational journalism, for some time, has come to a conclusion, or, at least, to a temporary halt, by the decision of Judge Sullivan in favor of the plaintiff. From all that we can gather concerning it, we are satisfied that, though very great pecuniary interests are involved, the decision is a conscientious one, by a judge of firmness and integrity, who commands the confidence of the bar and people of California. Beyond this, little is to be said, except that the contention was whether any marriage had ever existed. It seems that none was ever formally solemnized; but that a marriage contract was proved, and also letters from the defendant to the plaintiff, in which he addressed her as "My dear wife." His defense was, that these documents were forgeries; but a strong color was given to the plaintiff's case from the fact that he had invited her to the wedding of his daughter to Sir Thomas Hesketh, and, if we understand the testimony, had introduced her to his daughter as his wife. Accumulated perjury seems to have been committed on both sides. The public verdict in California seems to be almost unanimous in holding the woman a mere adventuress, playing for a pecuniary stake of several millions, which, when she gets it, she will divide with lawyers more adroit, and perhaps not less scrupulous than herself. On the other hand, not a particle of sympathy has been developed in favor of the defendant. Of course, he will appeal; and whether he will gain anything by his appeal would seem to depend upon the weight which the Supreme Court of California, under the Code of that State, gives to the decisions of district courts on questions of fact in divorce cases.

JAMES BETHUNE, Q. C.—We find the following obituary notice in the Montreal *Legal News:*

"James Bethune, Q. C., a prominent member of the Ontario bar, died at Toronto, Dec. 18, of typhoid fever. Mr. Bethune was born in Glengarry county in 1840, and called to the bar in 1862. Within a very few years he acquired a leading position in the profession, which he retained up to the time of his death. For five years he acted as county crown attorney for the united counties of Stormont, Dundas and Glengarry, where also for some time he performed the duties of deputy judge. Mr. Bethune was engaged in a great many of the most important cases that have come up in the sister province during recent years, and his services were highly esteemed. By the premature termination of his career the Ontario bar is deprived of one of its ablest members."

From a casual acquaintance with Mr. Bethune, and some knowledge of his reputation, we are led to believe that the above notice does him no more than justice. He possessed a remarkable memory, and his mind was a storehouse of the most varied and extensive matters relating to his profession. He was urbane in his manners, and broad-minded and liberal in his ways of thinking.

Such a man, in the legal profession, inevitably assumes, by the admitted superiority of

his character and attainments, without exciting envy or jealousy, a position at the head of the bar. No very great prizes lie within reach of the members of the legal profession in Canada; but, of such as there are, had Mr. Bethune lived, he must have reached out and taken the very first. Such a man is an ornament to the legal profession in any country and at any period, and his death in the midst of his career is a lamentable calamity. American lawyers will recognize a conspicuous portrait, if we add that Mr. Bethune bore a very striking resemblance to Hon. John F. Dillon.

INJUNCTIONS IN GOVERNMENTAL MATTERS.—The indecent imbroglio which has recently taken place in the city government of New York, relating to certain appointments to office, will tend to increase public disgust for a judiciary as closely connected with practical politics as that of New York city. It seems that Mayor Edson, just at the close of his term of office, made nominations to the offices of commissioner of public works and corporation counsel. Those nominations were subject to confirmation by the board of aldermen; but a judge launched an injunction against the Mayor, restraining him from nominating, and against the aldermen, restraining them from confirming any persons to these positions. These injunctions the Mayor and aldermen, under the advice of counsel, disobeyed. Then, by a singular confusion in the New York statutes, it appears that Mayor Edson's term of office expired at midnight of Wednesday, December 31, and that of his successor, Mayor Grace, did not commence until noon of Thursday, January 1. During this interregnum of twelve hours, the powers of the Mayor devolved upon the president of the board of aldermen, a gentleman named Kirk. By another anomaly, an act of the Legislature known as "the Roosevelt Act" went into effect at midnight of Wednesday, twelve hours before the inauguration of the new Mayor thereunder. By this act, appointments are not required to be confirmed by the aldermen. During this interregnum, Mr. Kirk, with unparalelled indecency, assumed to make an appointment, filling the office of corporation counsel, by appointing E. T. Wood, a brother-in-law of ex-Mayor Edson. This appointment was contested by Mr. Lacombe, the old corporation counsel, and the new Mayor, Mr. Grace was obliged to detail a squad of police to protect him in the possession of the office. Other dramatic surroundings existed. During the last day of his tenure of the office, Mayor Edson had the doors of his office barricaded and his windows guarded by police, in such a manner that process-servers from the courts vainly endeavored to get to him with their writs. The singular thing connected with it is that the writ of injunction should be employed to restrain the appointment of public corporation officers. There is no principle known to students of the books of equity which warrants such a use of the writ of injunction. From the very earliest times in England, the subject of amotion from office and usurpation of office, with reference to municipal and other public corporations, has been under the exclusive control of the Court of King's Bench; and the ancient reports,—the Year Books, and the reports of Latch, Comberbach, Keble, and many others,—literally teem with cases in which the writ of *mandamus* was resorted to in the King's Bench to restore to their offices the officers of such corporations who had been unlawfully removed; and in which the writ of *quo warranto*, or the statutory information in the nature of *quo warranto*, was resorted to to oust from their seats persons who had usurped the functions of such offices. The Court of Chancery never interfered with corporations in public or governmental matters, except where there was a trust to be administered,[1] or where it was necessary to restrain *ultra vires* acts injurious to public rights.[2]

[1] The following are cases of this kind: Att'y-Gen. v. Brown, 1 Swanst, 265; Att'y-Gen. v. Forbes, 2 Myl. & Cr. 123; Att'y-Gen. v. Aspinall, Id. 613; Att'y-Gen. v. Corp. of Poole, 4 Myl. & Cr. 17; Att'y-Gen. v. Mayor of Liverpool, 1 Myl. & Cr. 171, 210; Att'y-Gen. v. Corp of Norwich, 2 Myl. & Cr. 406; Att'y-Gen. v. Corp. of Litchfield, 13 Sim. 546; State *ex rel.* v. Saline County, 51 Mo. 350; State *ex rel.* v. Calloway County, 51 Mo 395. Hayman v. Governors of Rugby School, L. R. 18, Eq. 28; s. c. 30 L. T. (N. S.) 217; Willis v. Childe, 13 Beav. 117; Dummer v. Corp. of Chippenham, 14 Ves. 245; *Re* Fremington School, 11 Jux. 421; s. c. 10 Jux. 512; Dean v. Bennett, L. R. 6 Ch. 489; *Re* Beloved Wilkes Charity, 3 Mac & G. 440; Dangars v. Rivaz, 28 Beav. 333.

[2] Att'y-Gen. v. Mid. Kent R. Co., L. R. 3 Ch. 100; Att'y-Gen. v. Great Northern R. Co., 4 DeGex & Sim. 75; Att'y-Gen. v. Railroad Companies, 35 Wis. 425.

NOTES OF RECENT DECISIONS.

ALIMONY FOR THE TERM OF THE LIFE OF THE WIFE.—In *Lennahan v. O'Keefe*,[1] it is held that a decree awarding alimony to a wife during the term of her life, is erroneous. The reason given is that the right of alimony is founded upon the husband's obligation to support his wife, which, of course, ceases at his death. When that event happens, the law provides for her in the form of dower in her husband's realty and a distributive share in his personalty. This is in conformity with what is said by Dr. Bishop in his work on marriage and divorce, § 428.[2]

MUNICIPAL CORPORATIONS—USE OF STREETS FOR TELEPHONE POLES AND WIRES.—The English Court of Appeals have lately decided that the municipal corporation (in the particular case, a local board of works) in which is vested a public street, for the purposes of keeping it open, improved and repaired as a public street, does not own the space above the street *usque ad cœlum*. They do not even own it as high as the nebula in Andromeda, nor any higher than the tops of adjacent chimneys. The question was, whether, under a statute known as the Metropolitan Management Act,[1] the board of works for a particular district of the Metropolis were entitled to an injunction to prevent a telephone company from carrying their wires diagonally across the street at the level of the chimneys, the owners of the houses not objecting, and there being neither nuisance nor appreciable danger. Mr. Justice Stephen awarded the injunction. An appeal was prayed for before Brett, M. R., Bowen, L. J. and Frey, L. J. Their Lordships allowed the appeal, holding that the principle laid down in Coverdale v. Charlton (48 Law J. Rep. Q. B. 128) applied; that only such a property in the street, both with regard to depth below and height above, was vested in the plaintiffs as was necessary for the ordinary user of the street as a street; and that no interference with that property had been established in this case, inasmuch as no nuisance had been created, nor was there any appreciable danger.[2] The Supreme Court of Louisiana has lately decided that telephone poles erected in the streets are not nuisances in the sense that abutting lot owners can require them to be removed.[3] The St. Louis Court of Appeals decided the same question in the same way,[4] but the Supreme Court of New York, for the City of New York, has taken the opposite view of the question.[5]

MEASURE OF PROOF TO ESTABLISH INSANITY.—A good deal of conflict of opinion exists upon the question what degree of proof is necessary to establish the defense of insanity on the trial of an indictment for homicide—whether the defendant must make his insanity appear by a preponderance of evidence, or whether it is sufficient that he raise a reasonable doubt of his sanity at the time of committing the homicide. In State v. Jones[1] the Supreme Court of Iowa has lately had this question before it, and the judges remained divided in opinion. A majority of the court, (Rothrock, C. J., and Seavers, J., dissenting) held that the defense must be made out by a preponderance of evidence; that is to say, the defendant, upon whom the burden of proof rests, must *turn the scale* by evidence which creates a *probability* that he was insane.

PAYMENT OF ONE CREDITOR CONVERTED INTO A STATUTORY ASSIGNMENT FOR ALL CREDITORS.—In Missouri, there is a statute allowing a debtor to make an assignment of his property for the equal benefit of all his creditors. The assignee gives bond, and the trust is administered under the direction of the Circuit Court. In the case of Martin v. Hausman,[1]

[1] 107 Ill. 626.

[2] See also Wallingford v. Wallingford, 6 Harris & Johnson, 438; Lockridge v. Lockridge, 3 Dana. 28; Clark v. Clark, 6 Watts & S. 85; 1 Blackstone's Com. 441.

[1] 18 and 19 Vict. ch. 120, § 96.

[2] Board of Work v. United Telephone Co., Limited' Reported, 7 Montreal Legal News, 363.

[3] Irwin v. Greatsatalse, Sup. Ct. La., Dec. 15, 1884.)not reported.)

[4] Gay v. Mutual Union Tel, Co., 12 Mo. App. 485; Forsythe v. Baltimore & Ohio Tel. Co., Id. 480.

[5] Metropolitan Tel. Co. v. Colwell Lead Co., N. Y. Daily Register, Aug. 13, 1884.

[1] 20 N. W. Rep. 470; s. c. 17 N. W. Rep. 911.

[1] 14 Fed. Rep. 160.

the Circuit Court of the United States for the Western District of Missouri held that, where a debtor who is insolvent, transfers all his property to a single party, not for the purpose of giving a security, or for the purpose of paying a debt, but with the view of reclaiming the property afterwards, such transfer, no matter what may be the form of the instrument, whether that of a chattel mortgage or otherwise, and whether made to a creditor directly, or to a trustee, is to be treated as a general assignment under the statute for the benefit of all his creditors. This decision was followed in Dahlman v. Jacobs,[2] in Kellogg v. Richardson,[3] and in Clapp v. Dittman.[4] In the last named case, Mr. Circuit Judge Brewer, who, by the way, is an able judge, in giving the opinion of the Court, said: "I confess my own conclusions would be different, and in harmony with Bank v. Sprague,[5] Farwell v. Howard.[6] Doremus v. O'Harra,[7] Atkinson v. Tomlinson;[8] yet I think there has been such a course of decision in this circuit as to establish the rule for the United States courts for this state in accordance with Martin v. Hausman." The *jus disponendi* is essential to the very idea of property. Every man owning property has a right to dispose of it for any lawful purpose. He has a right to use it for the payment of any lawful debt which he may have contracted. He has a right to use it to secure a *bona fide* creditor, so that he do not create a reservation in favor of himself which operates to keep it in existence for himself, and to hold it beyond the reach of his other creditors. Such a conveyance, then, is either good or bad. If it is good, it must be allowed to stand as he has made it. He having made one lawful contract, the law cannot step in and make a different one for him. If it is bad, the law will set it aside at the suit of a diligent creditor, and subject it to the payment of the demand of that creditor. But when the diligent creditor brings his bill to have it set aside, there is no principle known to the law under which his bill in equity can be converted into a petition in bankruptcy. He may if he chooses, bring his suit on behalf of himself and such other creditors as may choose to join him, but he is not obliged to do so. Equity favors the diligent, and not the sleepy creditor; and it is a stranger to a principle, which, after one creditor has shaken the tree, allows all the other creditors to come forward and assist him in picking up the fruit.

[2] 15 Fed. Rep. 863.
[3] Unreported.
[4] 18 Repr. 423.
[5] 20 N. J. Eq. 28.
[6] 26 Iowa, 381.
[7] 1 Ohio St. 45.
[8] Ib. 241.

MEASURE OF DAMAGES IN CASE OF PERSONAL INJURIES—UNSKILLFUL TREATMENT BY A PHYSICIAN.—In *Houston, etc. R. Co. v. Hollis*,[1] the action was for injuries to the person, and it was assigned for error that the court had refused to give the following instruction requested by the defendant: "If you believe from the evidence that any part of the plaintiff's injuries when inflicted were temporary and not permanent, but were rendered permanent by the improper and negligent treatment of a physician at any time afterward, then you are instructed that the defendant would not be liable for any effects brought about by such treatment." It was held by the Texas Court of Appeals that this ruling was not erroneous. In giving the opinion of the Court, Willson, J., said:

"We find, from examination, that the rule is well settled that the fact that the plaintiff's injury has been aggravated by the mistake of a competent surgeon, whom he employed in good faith, will not have the effect to reduce the damages.[2] Mr. Thompson states the rule thus: 'If, through the negligence of A, B suffers an injury without his own fault, A is answerable for it; but he is not answerable for any aggravation of the injury produced by the subsequent negligence of B. The rule under this head, is, that where the primary cause of the damage was the negligence of the defendant, the plaintiff will be entitled to the full amount of the damages sustained, unless the damage has been increased by his own subsequent negligence; and whether this is so or not, will be a question for the jury. If A has received a physical injury for which B is liable, and A exercised reasonable care, under the circumstances, in the selection of a physician or surgeon to treat the wound, but, notwithstanding this, the hurt is aggravated by the unskillful treatment of the surgeon or physician thus employed,

[1] 4 Tex. L. Rev. 423.
[2] Pierce on Railways, 304; Cooley on Torts, 683.

A may recover of B the enhanced damages produced by the unskillful treatment; they are deemed to follow proximately from B's wrong.[3] In the case before us, the evidence shows that appellee, in good faith, employed a competent physician and surgeon to treat her injuries, and that in this respect she was not guilty of any degree of negligence. It was not error, therefore to refuse the requested instruction, because, in the shape it was presented, it was not the law."

SEPARATION OF THE JURY IN CRIMINAL TRIALS.—The Supreme Court of Pennsylvania, in *Moss v. Com.*,[1] take a distinction in respect of granting new trials in criminal cases because of the separation of a juror from his fellows pending the trial, between cases where the verdict has convicted the prisoner of a capital crime and cases where it has convicted him of a crime not capital. The distinction relates to the burden of proof. In the former case, the separation creates a presumption against the integrity of the verdict, which casts upon the commonwealth the burden of showing by clear and satisfactory evidence that no improper influence was brought to bear upon the juror during his absence. But we infer from the decision that where the verdict finds the prisoner guilty of a crime not capital, such a presumption does not necessarily arise; and whether in such a case the separation will afford ground for a new trial, must depend upon a consideration of the facts and circumstances attending it. In other words, we understand the Pennsylvania Court to apply, in cases less than capital, the rule that the mere fact that a juror separates from his fellows is not of itself *prima facie* ground for a new trial, but that something more must be shown sufficient to cast a reasonable suspicion upon the purity of the verdict.[2] But where the jury have found the defendant guilty of a capital felony, a separation of the jury, or of one juror from the rest, will be ground for a new trial, unless it affirmatively appear that the separating jurors were not subjected to any improper influence.[3]

HOMESTEAD EXEMPTIONS OUT OF PARTNERSHIP ESTATES.—In the case of Short v. McGruder,[1] the Circuit Court of the United States for the eastern district of Virginia has added one case to the preponderating list of cases on a disputed question relating to the law of homestead exemptions, by holding that, under the Virginia homestead law the partners in an insolvent firm can not reserve to themselves homestead exemptions out of partnership personalty to the detriment of partnership creditors. The case was that an insolvent partnership made an assignment of its goods, reserving to itself in the deed of assignment their "homestead exemptions," by reciting that each partner was a householder and head of a family, and desiring to secure for himself and his family the benefit of their homestead exemptions they "do hereby declare their intention to claim, and do, each for himself, claim such homestead

[3] 2 Thomp. on Neg. 1091.

[1] 15 Pittsb. Leg. Jour. N. S. 107.

[2] Rex v. Kinnear, 2 Barn. & Ald. 462; Rex v. Woolf, 1 Chit. Rep. 401; Ragland v. Wills, 6 Leigh, 1; Burns v. Paine, 8 Tex. 159; Brandin v. Grannis, 1 Conn. 402; State v. O'Brien, 7 R. I. 336; Berry v. State, 10 Ga. 511, 524; Nelson v. State, 32 Tex. 71; State v. Lytle, 5 Ired. L. 58, 62; Wakefield v. State, 41 Tex. 556; Jack v. State, 26 Tex. 1; State v. Turner, 25 La. An. 573; State v. Madoil, 12 Fla. 151; State v. Fox, Ga. Dec. pt. I, p. 35; Heiser v. Van Dyke, 27 Iowa, 350; Cook v. Walters, 4 Iowa, 72; Miller v. Mabon, 6 Iowa, 456; Smith v. Thompson, 1 Cow. 221; Stutsman v. Barringer, 16 Ind. 363; Porter v. State, 2 Ind. 435; Edrington v. Kiger, 4 Tex. 89; State v. Igo, 21 Mo. 459; Whitney v. State, 8 Mo. 165; State v. Harlow, 21 Mo. 446; State v. Mix, 15 Mo. 153; Crane v. Sayre, 6 N. J. L. 110. But see Rev. Stats. Mo. 1879, § 1966. The rule has been laid down in the following cases, chiefly capital: Adams v. People, 47 Ill. 376; Reins v. People, 30 Ill. 256, 273; People v. Douglass, 4 Cow, 26, 38; State v. Babcock, 1 Conn. 401; Coker v. State, 20 Ark. 53; Bilanski v. State, 3 Minn. 427, 431; State v. Miller, 1 Dev. & B. 500, 509; People v. Bonney, 19 Cal. 426; State v. Brannon, 45 Mo. 329; State v. Barton, 19 Mo. 227; Caw v. People, 3 Neb. 357; State v. Harris, 12 Nev. 414.

[3] McCann v. State, 9 Smed. & M. 465; Woods v. State, 43 Miss. 364; Cornelius v. State, 12 Ark. 782, 809; Coker v. State, 20 Ark. 53, 60; Commonwealth v. McCaul, 1 Va. Cas. 271, 301; Overbee v. Commonwealth, 1 Rob. (Va.) 756; Westmoreland v. State, 45 Ga. 225, 282; State v. Sherbourne, Dudley (Ga.) 28; McLain v. State, 10 Yerg. 241; Stone v. State, 4 Humph. 27, 38; Cochran v. State, 7 Humph. 544; Hines v. State, 8 Humph. 597; Maker v. State, 3 Minn. 444, 447; Phillips v. Commonwealth, 19 Gratt. 485; People v. Backus, 5 Cal. 275 (overruled in People v. Bonney, 19 Cal. 426); Russel v. People, 44 Ill. 508; Jumpertz v. People, 21 Ill. 411; McKinney v. People, 7 Ill. 540, 553; McLean v. State, 8 Mo. 153; Eastwood v. People, 3 Park. Cr. R. 25, 48 (overruled in Stephens v. People, 19 N. Y. 549); State v. Frank, 23 La. An. 213; People v. Shafer, 1 Utah Ter. 260; Com. v. Shields. 2 Bush. 81; State v. Dolling, 37 Wis. 396; Rowan v. State, 30 Wis. 129; Keenan v. State, 8 Wis. 132; Madden v. State, 1 Kan. 341; Wood v. State, 34 Ark. 341.

[1] 8 Va. L. J. 592.

exemptions, with a description so claimed as hereafter contained." It was held that this reservation was invalid. The Constitution of Virginia[2] creates a homestead exemption in favor of every house-holder, or head of a family, out of *his* rea or personal property, or either, including money and debts due him. This Statute[3] follows the Constitution, and everywhere uses the singular number. Hughes, J., laid stress upon this fact in reaching the conclusion above stated; but it is obvious that this form of language affords no sound basis of argument. In the construction of statutes, nouns in the plural number are interpreted as though they were in the singular number, and *vice versa*, according to the context and general intent. The word "witness," in the 7th section of the English Habeas Corpus Act was early held to mean a single witness as well as several witnesses. The principle of interpretation adopted by Hughes, J., proves quite too much, for it could be equally invoked to deny a homestaad exemption in real estate held by the debtor, as a tenant in common with some other person or persons. But there is much authority to the effect that an exemption exists in such an estate,[4] though it must be confessed, there is much good authority to the contrary.[5] Upon principle, and upon the obvious policy and intent of homestead and exemption laws, the reservations created by such laws should be held to extend to partnership property, as well as to individual property. The rule of unanswerable logic is this: "Whatever the creditor under his execution can sell, the debtor, if he possess the qualification prescribed by the statute, can hold." It is nonsense for the creditor to be permitted to say to the debtor: "I can sell your property under my execution because it yours, and you can not claim it under the exemption law because it is not yours." There seems, however, to be a decided preponderance of decisions in favor of the rule that there can be no exemption in favor of an individual partner out of partnership property, unless the Statute creating the exemption so provides.[6] Some of the cases go so far as to hold that there can be no homestead reservation in favor of a single partner out of partnership realty,[7] although in respect of such property the partners are, in law, tenants in common. The contrary has been held by one court,[8] and several respectable courts have maintained the doctrine that exemptions may be allowed in favor of a single partner out of partnership assets.[9]

[2] Art. 11, § 1.

[3] Va. Code, Ch. 183, § 1.

[4] McClary v. Bixby, 36 Vt. 254; Thorn v. Thorn, 14 Iowa, 49; Lacey v. Clements, 36 Tex. 663; Williams v. Wethered, 37 Tex. 130; Smith v. Deschaumes, 37 Tex. 429; Hewitt v. Rankin, 41 Iowa, 35, 44; Tarrant v. Swain, 15 Kan. 146; Horn v. Tufts, 39 N. H. 478: Greenwood v. Maddox, 27 Ark. 660.

[4] Thurston v. Maddox, 6 Allen, 427; Wolf v. Fleischacker. 5 Cal. 244; Reynolds v. Pixley, 6 Cal. 165; Kellesberger v. Copp, 6 Cal. 565; Bishop v. Hubbard, 23 Cal. 517; Elias v. Verdugo, 27 Cal. 418; Seaton v. Son, 32 Cal. 481; Kingsley v. Kingsley, 39 Cal. 665; Cameto v. Dupuy, 47 Cal. 79; Ward v. Huhn, 16 Minn. 159: West v. Ward, 26 Wis. 580; Lozo v. Sutherland, 3 Mich. Lawyer, 218; Ventress v. Collins, 28 La. An. 783; Simon v. Walker, 28 La. An. 608. Baron v. Sollibellos, 28 La An. 355. See also, Amphlett v. Hibbard, 29 Mich. 298; Bemis v. Driscoll, 101 Mass. 421.

[6] *Re* Haudlin, 3 Dill. 290; Pond v. Kimball, 101 Mass. 105; Guptil v. McFee, 9 Kan. 30; *Re* Smith, 2 Hughes, 307; Bonsall v. Conely, 44 Pa. St. 447; Wright v. Pratt, 31 Wis. 99; *Re* Price, 6 N. B. R. 400; *Re* Blodgett, 10 F. B. R. 145; Clegg v. Houston, 1 Phila. Rep. 352; s. c. 9 Leg. Int. 67; Kingsley v. Kingsley, 39 Cal. 665; Russell v. Lennon, 39 Wis. 570; (Overruling Gilman v. Williams, 7 Wis. 329;) Amphlett v. Hibbard, 29 Mich. 278; State v. Spencer, 64 Mo. 355; Gaylord v. Imhoff, 26 Ohio St. 317; *Re* Boothroyd, 14 N. B. R. 223; Rhodes v. Williams, 12 Nev. 20, 28.

[7] Amphlett v. Hibbard, 29 Mich. 298; Kingsley v. Kingsley, 39 Cal. 666.

[8] Hewitt v. Rankin, 41 Iowa, 35, 44. Compare Rhodes v. Williams, 12 Nev. 20, 28.

[9] Farmers', etc., Bank v. Franklin, 1 La. An. 393; Harrison v. Mitchell, 13 La. An. 260; Radcliff v. Wood, 25 Barb. 51; Stewart v. Brown, 37 N. Y. 350; Burns v. Harris, 67 N. C. 140; *Re* Young, 3 N. B. R. 440, U. S. Dist. Ct. East. Dist. Mo., Treat, J.; *Re* Rupp. 4 N. B. R. 95, U. S. Dist. Ct. N. Dist. Ohio, Sherman, J.; *Re* McKercher, 8 N. B. R. 409 Sup. Ct. Dak. T., Kedder, J.; *Re* Richardson, 11 N. B. R. 114, U. S. Dist. Ct. East. Dist. Mo., Treat, J. See also Brewer v. Granger, 45 Ala. 580, where a mercantile partner was allowed his exemption out of the stock in trade, the right not having been challenged.

WHO ARE FELLOW-SERVANTS — THE LAST UTTERANCE OF THE SUPREME COURT OF THE UNITED STATES UPON THIS SUBJECT.

The relation of master and servant as applied to corporations, especially railroad companies, in the operation of their roads in

this country and in England, has become one of immense magnitude. Growing out of this relation has been much litigation, and out of its discussion and settlement by judicial decision, there has, within a few years past, accumulated a vast number of cases. Indeed, the cases growing out of a single branch of the relation, the one forming the title to this article, alone, within the last twenty years, would fill many volumes of reports, beside the many chapters of text-books which have been written. As an illustration of the growth of this branch of the law, it is only necessary to state that the writer, something over twenty years ago, had occasion to litigate the general doctrine of the liability of the master for the negligence of the servant, whereby a fellow-servant was injured, and the whole range of decided cases touching the question did not exceed a dozen; while now we see the accumulation of cases has almost rendered them innumerable.

There has ceased to be any controversy upon the general proposition that the master, either a corporation or an individual, is not liable for an injury caused to a fellow-servant, by the negligence of a servant engaged in the same common employment, where no negligence is attributable to the master. But the question, "Who are engaged in the same common employment?" "Who are fellow-servants?" continues to be discussed.

But, concerning this last proposition, there has been a wonderful uniformity of decision in the courts, both in England and in this country, in which this question has undergone discussion and judicial determination, upon the main point, defining who are fellow-servants.

There has been great harmony, however, between the English and American decisions, as a citation of them will abundantly show. And, again, there has been equal uniformity in the decisions of the State courts of the several States in this country. The current of authority is so uniform, steady, strong and satisfactory, as to be overwhelming. Indeed, few questions, about which there has ever been any difference in the leading courts of the country, seem to have been so firmly settled. But the Supreme Court of the United States seems, for the first time, to have encountered the question squarely, and to have made a decision which, if not qualified upon re-hearing, or overruled, bids fair to disturb this uniform current of authority. Taking into consideration the great eminence of the judges of the court, and the far-reaching influence of its decisions, even upon questions of this sort, especially considering that its decisions bind all the Federal circuit courts in all the States, and that the question is likely to be litigated, and a different line of decision established in the Federal courts, from that so well settled in the State courts of nearly every State in the Union, it can but be regretted that this break in the uniformity of decisions should have occurred in such a ruling by that great court. The case referred to is the Chicago, Milwaukee and St. Paul R. Co. against Duncan O. Ross. The opinion was delivered within the last month, and is just published.[1] The case is a very simple one. The conductor of a freight train, taking his train out of Minneapolis, neglected to notify the engineer of the train of an order which he had received from the train dispatcher, to stop at South Minneapolis. The engineer, without fault, upon his failure to receive the order, by the negligence of the conductor, ran his train upon a gravel train, and, being injured, sued the company. The court below, the circuit court for the Minnesota district, instructed the jury that, if, without negligence on the part of the engineer, and by the fault of the conductor, the injury occurred, the company was liable. The plaintiff had a verdict and judgment. A writ of error was prosecuted to the Supreme Court of the United States. The case was there affirmed by a divided court, Bradley, Matthews, Blatchford and Gray dissenting. The opinion was delivered by Mr. Justice Field.

It will be observed, from the opinion of the majority reported in a former number,[2] the question of law is discussed upon instructions only. There is no evidence in the record as to the authority and duties of conductors. Hence, only facts of which courts take judicial knowledge are admissible in the discussion of such authority and duties. How far the case was influenced by the statement of facts by the learned justice who delivered the

[1] 20 C. L. J. 27.
[2] *Ante*, p. 27.

opinion, can hardly be determined from the reading of the opinion; but it is manifest that the reasoning upon which the decision is based, assumes certain facts which, in many particulars, are erroneously stated. The reasoning of the court bases the doctrine of non-exemption, in this case, upon the assumtion that a conductor "is, in fact, and should be treated as, the personal representative of the corporation for whose negligence it is responsible to subordinate servants;" in other words, the assumption is, that a conductor of a railroad train is a vice-principal. Upon what reasoning is this assumption based? The court states its reason as follows:

"He directs when the train shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. 'In no proper sense of the terms,' says the court, 'is he a fellow-servant with the firemen, the brakemen, the porters and the engineer.'"

The legal accuracy of this utterance depends upon what is a "proper sense" of the term "fellow-servants." If the settled meaning given to the terms as defined by the courts of all the States in this country, and uniformly by the English courts; if the sense in which the court defines the term in this opinion at the outset, is a "proper sense," then the conductor and the engineer are fellow-servants. As to their mutual exposure to danger, resulting from careless acts in the discharge of the duties of their respective employments, the relation of conductor and engineer is the most intimate, the most dependent upon a common master, and the most exposed to injury from the negligent discharge of duty by each other, of any two employees in the railway service. While the conductor in general has control of his train, yet, within his sphere, the engineer is equally responsible to the common principal for faithful obedience to his orders, and herein is the cardinal error of the opinion, in the assumption of facts applicable to this case. The time, the manner, the speed, and all movements of the train, are fixed by a time card, prepared by the common superior, the superintendent. The engineer and the conductor each carry a printed copy of the same. They are equally bound by its terms. Both are guilty of a breach of duty if the time card, which contains full directions for the minutiæ of running the train, is violated. This time card can not be waived, except by an express written, (usually telegraphic) order from the superior. These orders are usually addressed to both, and are always intended for both, In some cases such orders are delivered to a station agent or local telegrapher and delivered by him, in others they are sent by the superintendent to the local telegraphic agent who delivers them to the conductor in duplicate, and he delivers one to the engineer, as seems to have been the rule with the company in this case, but in all cases, the O. K., or acknowledgement of the special orders, must be answered back to the supervising superior having absolute control and supervision over the movements of all the trains upon the particular road or subdivision, by both conductor and engineer. The correlation of the duties of the conductor and engineer, in many particulars, their dependence on each other's vigilance, circumspection and diligence for safety, their exposure to injury by the negligence of each other, their mutual dependence for authority, guidance and supervision upon a common superior, whose control over them both, in the discharge of their respective duties, is absolute and despotic, constitute them, in every just sense, both in law and in fact, fellow-servants.

It is manifest, from examination of the opinion under review, that the position of the court cannot be reconciled with its own definition of fellow-servants, and the reason on which the exemption from liability is stated therein. The proposition upon which this departure from the general rule is attempted to be sustained, by a denial that a conductor and engineer are fellow servants, and the assertion that the conductor, as to all the train men, including the engineer, stands in the place and represents the corporation, is, we submit with deference, merely assuming the point in controversy, contrary to the logic of the opinion of the court in its general statement of the rule of liability and its reasons therefor. In other words, it is making a distinction as to liability based upon names and designations of employees, rather than upon a consideration of the true nature and relation of their respective em-

ployments. This formulation, however, by the court, is based upon the theory of the presumed presence of the principal in reference to the acts of servants or agents. The familiar maxim, *Qui facit per al ium, facit per se*, applies to agents of a railroad company or corporation as it does to-natural persons, and in all cases within the range of the employment of the servant or agent, as to strangers, the maxim is applicable. But, as we have already seen, it has no application to the acts of fellow servants in the relation under discussion. The difficulty, in all cases, is to determine where there is the presumed presence of the principal, whether the principal be a corporation or a natural person.

This line is well defined. A person can not be principal and agent, master and servant, both, at the same time. There can not be the presumed presence of the master, as between fellow-servants, in any case where the person who is to represent the master, acts only in the discharge of his duty under the intelligent guidance of a superior. Assuredly, this can not be so in a case where every act within the scope of his employment is done upon written rules and regulations prescribed by a superior and subject to be changed, countermanded, or revoked, at any moment, by him only. The superior of the conductor, he who has the control of the movements of his trains and all others, can, by placing his hand upon the key of the telegraphic instrument, command both conductor and engineer to stop, and they dare not move without leave from the superior. The engineer, who is sought by this opinion to be treated as the inferior of the conductor, and under his control, may stop the train under an order from the superior, and the conductor dare not move it. That the superintendent who controls the movements of trains, who employs and discharges all the men engaged in operating the same, represents the principal, that his acts are the acts of the principal, that his negligence is the principal's negligence, and that the corporation is liable for the same, as well to the servants operating trains under his direction as to strangers, there is no question. But beyond that the courts have never gone.

How, then, can the conductor, who only executes the orders of the superintendent, and has no independent control, represent the principal in the same act? He is in the inconsistent attitude of master and servant both, in performing the same service. Such a proposition is certainly startling if not absurd. The act of negligence here complained of, was the ommission to obey a command as a *servant*, and not to give one as a *master*, and this must be conclusive. To adopt such a theory as this opinion announces would destroy all harmony and all analogy in the law of master and servant in this relation. If the conductor represents his principal in his acts toward the engineer, the engineer has more despotic control over the fireman, and the principal is personally represented in the negligence of the engineer toward the fireman, and so on through all the grades where there is subordination.

The truth is, this whole doctrine of the presumed presence of the principal, excepting as to agents who exercise the controlling power, discretion and rational direction of some department, as superintendent, manager or governor; some position in which the executive control is exercised, as vice-principal, is illogical, confusing and mischievous.

The doctrine is not a new one, but it has no intelligent basis. It has never been sustained by the courts in this country. It first grew out of a misunderstanding as to the assumed differences between corporations and natural persons. The contention is this: A corporation can only act by agents, hence, unless it be presumed to be present in all the acts of its servants and agents, it will escape responsibility, and herein an attempt has sometimes been made to make a distinction between natural persons and corporations; but this attempt is based upon a shallow fallacy. There is no difference, as applicable to the doctrine under discussion here.

There would be no difference between a railroad owned by an individual and one owned by a corporation. If a natural person should own a railroad, he would be the proprietor, and his general manager or superintendent, who directed the whole business of the railroad, supervised it, and had sole control of his business if he were not the owner, would be vice-principal to the owner. If it were divided into independent departments, and any of

those departments had a superintendent or principal who was charged with the duty of having supervision over the whole department, employing and discharging its servants, and directing and controlling all its operations in such a department, he also would be a vice-principal, and the principal would be responsible for his negligence to the other servants of his department. But below that, the rule as to fellow-servants could not logically apply. Nor can it, when the property is owned and managed by a railway company, any more apply. It is very manifest that a conductor, as we have already seen, is a subordinate in every sense of the word, and, as to the other employees, his acts can not be regarded as representing the corporation. This doctrine of the presumed presence of the corporation in acts of its servants, was attempted to be extended by Judge Redfield, in his work on Railways. He carried it so far, in his section concerning liabilities of railroad companies for the acts of their servants, that he virtually avowed a different rule of liability as applying to corporations from the one governing natural persons. 1. Redfield on Railways, p. 310, sec. 2, and notes. While discussing the opinion of Lord Kenyon, in McManus v. Cricket, 1 East, 106, settling a distinction upon another phase of the doctrine of master and servant, this case having been cited in E. & C. R. Co. v. Baum,[3] the theory of Judge Redfield on this subject and his criticisms upon his Lordship's opinion having been quoted against the case, the court answers it thus:

"Nor will sound policy maintain the application of a rule of law to railways or corporations, on this subject, which shall not be applied alike to others as has been intimated in some quarters. The suggestion is not fit to be made, much less sanctioned in any tribunal pretending to administer justice impartially.

Judge Redfield virtually maintains the same doctrine concerning the subject of fellow-servants in the section quoted in the opinion under consideration. The court in this case says of him: "Judge Redfield speaks with emphatic approval of the declaration that the corporation is to be regarded as constructively present in all acts performed by its general agents within the scope of their authority."

The consequences of mistake or apprehension upon this point,' says the author, 'have led many courts into conclusions, greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees and the just responsibility of the company. We trust that the reasonableness and justice of this construction will at no distant day induce its universal adoption.

The quotation itself shows that, although the doctrine announced is a favorite theory of the writer, yet it is not regarded by him as the law; and what will surprise the courts and the profession, we submit deferentially, is the endorsement of this exceptional theory, calculated to disturb the well-settled doctrines of the law in one of its most familiar branches, to destroy its harmony and conformity to the analogies of the law, by the highest judicial tribunal in the United States, without a better basis of authority, even by a bare majority. Nor does the authority support the opinion, for a railroad conductor is not a *general* agent within the meaning of the quotation, which, though indefinite and confusing, does go to this extent.

We submit that the court is equally unfortunate in the citation of decided cases as in the quotation from text writers. The quotation from Wharton is good law. The only mistake is its application to the hypothecation of the facts to which it relates. The discussion by the court of the New York cases does not, by a fair construction, extract from them any support for the opinion here. Indeed it is not claimed for them. The courts of New York as fully endorse the general doctrine as those of any other State. Two decided cases, only, are in point.[4] Of the former, Judge Rorer, in his work on railroads, published in 1884, having discussed the general doctrine of liability for negligence of fellow-servants, speaks as follows:

"The only American case with which we have met tending to a contrary rule, is that of the Little Miami Railroad Company v. Stephens, but which

[3] 26 Ind. 74.

[4] Little Miami R. Co. v. Stephens, 20 Ohio, 415; and the Louisville & Nashville R. Co. v. Collins, 2 Duvall, (Ky.) R. 114.

upon a close examination, rather avoids than overrides the rule. The decision there goes mainly upon the principle or supposed fact of the case, that the company, in its aggregate superior capacity, was negligent itself, directly, in not informing its engineer of a change of place of the passing of trains upon the road. In that case, a divided court held the imputed omission to have been that of the company itself, and not that of an ordinary servant. This case is nowhere recognized, that we have seen, as changing the rule laid down in the original text hereof."

Of the latter, it is enough to say that it was decided nearly twenty years ago, and the extract below is anything else but an assurance of the learning and erudition of the court thus attempting to establish a new line of decisions; the utterances by the court do not add much weight to the opinion then enunciated. The extract is as follows:

"This is the only doctrine we can recognize as consistent with the enlightened and homogeneous jurisprudence of the clearer day of its ripening maturity; and, looking through the mist of the adjudged cases and elementary *dicta*, we can see no other fundamental principle which can mould them into a consistent or abiding form. That principle is the only safe clue to lead the bewildered explorer to the light which shows the sure way to right, and proves the true doctrine of American law."

If this venerable judge, who has since passed away, had lived to the present time, he would have seen the mists of which he complained dispelled, and have been relieved from the bewilderment under which he labored when writing the opinion.

It is muchto be regretted, that, by an ingenious assumption of the scope of the authority of a railroad conductor, the court, by a mere fiction, should give him a position he does not occupy, and attach a liability to the company for his acts which does not properly belong thereto. It would seem inevitable that any fancied benefit which the court might contemplate from the change of the rule, will be overbalanced by the increase of litigation resulting therefrom.

Either a conductor is to be designated a vice principal, in contradistinction to all other servants, without regard to his authority, or throughout the range of the relation of master and servant, and the liability of the former for the acts of the latter, where these relations and liabilities are involved and litigated, the inquiry will be instituted whether every other servant, sustaining similar relations to the principal and his fellow-servants to that of conductor, is a vice-principal; and that, even though the law, as now settled, recognizes the servant as a fellow-servant with others in a common employment. This must result in much vexatious litigation. But it is not probable that a rule of law so well settled will be unsettled by one opinion, however high the court announcing it—certainly not by an opinion with so shadowy a foundation and rendered by a court so evenly divided. It may rather be predicted that when this question next comes before this court the eminent justices who dissented in this case will be in the majority.

ASA IGLEHART.

Evansville, Ind.

USURY BY NATIONAL BANKS.

PHILLIPS HILL v. THE NATIONAL BANK OF BARRE.*

Supreme Court of Vermont, May Term, 1884.

National Bank. Usury. U. S. Rev. Sts. § 5198.

The Federal statute provides the only remedy, and that by way of penalty, against a national bank, for the taking of usury; thus the plaintiff had brought a suit in the U. S. Court to recover the penalty prescribed by the said statute, and had obtained a judgment. *Held*, that he could not thereafter maintain an action of *assumpsit* in a State court to recover the excess above the legal interest paid to the bank.

General *assumpsit* to recover for the excess of legal interest paid the plaintiff to the defendant. Heard by the court, March Term, 1883, Redfield, J., presiding. Judgment for the defendant.

The defendant bank is a national banking association, organized, established, and existing by and under the laws of the United States, and is located and doing business at Barre. The plaintiff Hill, on the 14th day of April, 1882, brought suit against this defendant in the United States Circuit Court, within and for the District of Vermont, to recover the penalty prescribed by §§ 5197 and 5198 of the Revised Statutes of the United States, for the taking of interest by a national banking association at a greater rate than is allowed by the laws of the State where such association is located, and has recovered judgment in said suit for said penalty.

C. W. Porter, for the plaintiff; *E. W. Bisbee*, for the defendant.

ROWELL, J., delivered the opinion of the court: In Farmers and Mechanics National Bank v.

* S. C. 56 Vt. 582 (Advance Sheets).

Dearing, 91 U. S. 29, the plaintiff, a national banking association, organized under the national Bank Act, and located and doing business in the State of New York, knowingly discounted the note in suit at a greater rate of interest than was allowed by the laws of the State, and the question was, whether that made the note void, as provided by the State statute. The Court of Appeals of New York, following its decision in First National Bank of Whitehall v. Lamb, 50 N. Y. 95, held that it did; but the Supreme Court of the United States reversed that judgment, and held that it did not, and said that banking associations organized under said act are instruments designed to be used to aid the Government in the administration of an important branch of the public service; that they are means appropriate to that end; that Congress was the sole judge of the necessity of their creation; that being such means, and created and intended to be employed for such purpose, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see fit to permit; that in any view that can be taken of the thirteenth section of said act,—§ 5198 U. S. Rev. Sts.—the power to supplement it by State legislation is conferred neither expressly nor impliedly; and that when a statute creates a new offense and denounces the penalty, or gives a new right and provides the remedy, the punishment or the remedy can be only that prescribed by the statute.

After this decision, the Court of Appeals in National Bank of Auburn v. Lewis, 75 N. Y. 516, held that usurious interest could be recovered by way of set-off or abatement in an action on the note usuriously discounted.

Then came Barnet v. National Bank, 98 U. S. 555, holding the contrary, and that the remedy, given by the national statute for the wrong of taking usurious interest, is a penal suit, to which the party aggrieved or his legal representative must resort; that redress can be had in no other mode or form of procedure; that as the statute giving the right prescribes the redress, both provisions are alike obligatory on the parties; that the mode of redress is by suit brought specially and exclusively for that purpose, in which the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts that might confuse the case and mislead the jury to the prejudice of either party.

On the announcement of this decision the Court of Appeals ordered a re-argument in National Bank of Auburn v. Lewis, and modified its former decision therein in conformity therewith, holding it to be controlling.

Peterborough National Bank v.Childs, 133 Mass. 248, is to the same effect as National Bank of Auburn v. Lewis.

Prior to the decision in Barnet's case, the Supreme Court of Pennsylvania had held the other way in Lucas's case, 28 P. F. Smith, 228, and other cases; but after Barnet's case it held in conformity therewith in National Bank v. Dushane, 96 Pa. St. 340, treating all its former decisions to the contrary as overruled, and said that the defendant's only remedy was by a penal action for twice the illegal interest paid

The case of National Bank of Clarion v. Gruber, 91 Pa. St. 377, is much in point. It was debt, brought on March 4, 1876, to recover twice the amount of all payments of illegal interest made to the bank within two years next before the commencement of the action,and also all excess above legal interest paid during the additional period of four years before the fourth of March, 1874. The plaintiff declared specially for double the interest, and added the common counts in debt on which to recover the excess. The defendant contended below that there could be no recovery for any moneys claimed in the action, except for the penalty; but the court ruled otherwise, and held that recovery could be had for the excess over the legal rate paid during the four years prior to March 4, 1874, as well as for twice the amount paid in excess within two years from the time of the commencement of the suit. The Supreme Court held this error, and said that from Barnet's case "it appears certain that neither by set-off nor original action can interest over legal rate, paid to a national bank, be recovered except by way of penalty, as prescribed by the act of Congress of June 3, 1864."

Plaintiff relies on this case as reported in 87 Pa. St. 465; but it is not authority for him. Two points only were there ruled—first, that under the thirtieth section of the Bank Act, the State courts have jurisdiction of an action to recover the penalty thereby imposed; and second, that in such action the common counts in debt may be joined with special counts for the penalty. But it was not decided that recovery could be had, under the general counts, for the excess paid prior to two years before action brought, as the head note indicates, and when the case was again before the Supreme Court, and that point was ruled upon, it was ruled the other way, as we have seen.

Nor is Dow v. Irasburgh National Bank, 50 Vt. 112, authority for a recovery in this case. That was general *assumpsit*, and the only question in it was, whether the county court had jurisdiction of the action, and it was held that it had. Several other questions are suggested, and among them, whether the right of recovery would be limited to two years next before action brought, or would cover the whole period of our Statute of Limitations; but no opinion is indicated upon it.

There is no doubt about the correctness of that decision, so far as it holds that the State courts have jurisdiction of actions against national banks for taking illegal interest; but whether or not *assumpsit* is a proper remedy, we say nothing, for we hold, that the plaintiff has no rights in the premises, except those conferred on him by the Federal statute, and those have been fully realized and enforced by his suit in the circuit court.

Judment affirmed.

FIXTURES — MANURE — TRESPASS QUARE CLAUSUM FREGIT.

VEHUE v. MOSHER. *

Supreme Judicial Court of Maine, December 2, 1884.

1. *Farm Manure a Fixture.* Farm manure made upon the premises in the usual course of husbandry is a fixture.

2. *Trespass Quare Clausum Fregit.*. Trespass *q. c. f.* lies against a mortgagor who carts it away.

On exceptions. Trespass *qu. cl.* The opinion states the case.

E. O. Greenleaf, for the plaintiff; *H. L. Whitcomb*, for the defendant.

PETERS, C. J,. delivered the opinion of the court:

The plaintiff reeovered a conditional judgment for the possession of certain mortgaged premises. During the sixty days allowed before the conditional judgment became final, the mortgagor sold to the defendant a quantity of manure made upon the premises in the usual course of husbandry, the defendant during that period entering and taking the manure away.

According to our decisions, the manure belonged to the farm; was a part of the estate. The outgoing mortgagor, or his vendee, had no right to remove it therefrom. Chase v. Wingate, 68 Maine, 204; Norton v. Craig, Id. 275.

The defendant contends that trespass *quare clausum* cannot be maintained against him for the act. The position is that the action does not lie against the mortgagor, and therefore not against one licensed by the mortgagor to enter the premises. We think the action lies against the defendant, and would lie against the mortgagor had he done the same act. There is no intimation that the assignee of the mortgagee was not entitled to an immediate possession, though he was for a time postponed in getting possession by legal process.

The action (*quare clausum fregit*) lies by mortgagee against mortgagor for strip and waste. The mortgagor is not liable in the action for using the premises, the possession of which is not taken by the mortgagee, but may be sued in *quare clausum* for abusing them in certain ways. A mortgagor in possession, before entry by the mortgagee, may lawfully cut and remove grass growing upon the land. Hewes v. Bickford, 49 Maine, 71. He may take the rents and profits. He may cut firewood for use upon the premises. Hapgood v. Blood, 11 Gray, 400. He cannot cut and remove trees fit for timber in the market. Page v. Robinson, 10 Cush. 99. He cannot remove a building. Cole v. Stewart, 11 Cush. 181. Nor remove fixtures from a building. Smith v. Goodwin, 2 Maine, 173. He is liable in *quare clausum* for any act causing substantial and permanent injury.

Removing the manure in this case was of the same kind of injury and waste as removing trees or buildings or house-fixtures.

Manure, situated as this was, is itself a fixture.

Exceptions overruled,

Walton, Virgin, Libbey, Emery and Haskell, JJ., concurred.

* S. c. 76 Me. 469 (Adv. Sheets.)

WEEKLY DIGEST OF RECENT CASES.

1. ADMINISTRATION OF ESTATES OF DECEASED PERSONS.—*Surviving Partner who Administers not Entitled to Commissions nor Liable for Interest.*

Under the statutes of Missouri, the surviving partner who administers upon the partnership estate, is not entitled to commissions, nor liable to pay interest. *Gregory v. Menifee*, S. C. Mo., Dec. 1884; St. Louis *Republican*, Dec. 24, 1884.

2. ADMIRALTY.—*Lien for Money Advanced to Pay Off Liens.*

Money advanced upon the credit of the boat, to pay off claims of a maritime nature, entitled to liens either by the general maritime law or by State statute, and actually used for that purpose, are entitled to the same rank, upon distribution, as the claims which were thus paid off. And this lien is not lost by the fact that the master first obtained money of A for such purpose, and subsequently borrowed money of B, and repaid A. B occupies the same position which A held. *The Thomas Sherlock*, U. S. Dist. Ct., S. D. Ohio, Aug. 1884; 22 Fed. Rep. 253.

3. ———. *Circumstances under which Claims against River Steamboat Deemed Stale after Six Months.*

There is no inflexible rule in river navigation, fixing the length of time that must elapse to cause a claim to become stale. But where creditors were acquainted with the financial condition of a boat, knew her to be insolvent, had abundant opportunities of enforcing their claims, and knew that others were giving her credit, and yet continued to give her additional credit, and, upon sale and distribution of proceeds, there is not sufficient to pay all claims in full, *held*, that claims more than six months old, of such creditors, are stale. *Ibid.* [Compare Coburn v. Ins. Co., 20 Fed. Rep. 263; The Araturus, 18 Id. 743.]

4. ———. *Does not Prevent U. S Court from Proceeding to Judgment.*

The act of March 7, 1881, (Minn. St.) does not discharge a debt, unless the party discharges himself by releasing the debtor. As long as the plaintiff in the case chooses to stay out and say, "I will not release," he has a right to take a judgment which may at some time be effectual against the defend-

ant. In such a case, there is no donbt that the United States courts have power to render a judgment. *Ibid.*

5. APPLICATION OF PAYMENTS.—*To First Items on Running Account, when.*
A debtor may direct, on paying money to his creditor, the appropriation of it to a particular account, or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. Where money is paid generally on an account, without any appropriation, it should be applied to the first items in the account. And in an action to recover a balance due on a running account, the debtor can not be heard to dispute the validity of the items so paid. *Mackey v. Fullerton*, S. C. Colo., Nov. 14, 1884; 4 W. C. Rep. 569.

6. ARBITRATION—*Award without New Hearing after Third Party is Selected.*
Where a controversy is submitted to two arbitrators under an agreement for the selection of a third one in case the two are unable to agree, and after a hearing and disagreement they select a third man, an award made by two of them, without giving the party against whom it is rendered an opportunity of being heard is void and no recovery can be had upon it. *Alexander v. Cunningham*, S. C. Ill., Ottawa, Nov. 17, 1884.

7. ———. *Of the Proof of a Waiver of Right of a Hearing.*
Where an umpire or third party is, by agreement, called by two arbitrators upon their being unable to agree, in the absence of evidence to the contrary it will not be presumed that the parties have waived the right of being heard, and giving evidence before any award is made. The proof of a waiver of such right must be distinct and unequivocal. *Ibid.*

8. ATTORNEY.—*Evidence of a Retainer, to Object to Judgment for Taxes.*
Where a committee of an association, of which a lot owner is a member, employs counsel to defeat the collection of certain taxes claimed to be illegal, that being the object of such association, and such counsel appears before the county court, puts in objections for all persons of the association as to such tax, and such owner, in pursuance of his written obligation, pays the counsel a certain per cent. on all taxes defeated, this is evidence sufficient to show that such counsel had authority to appear for him in the county court, and resist the application for judgment against his lots. *Neff v. Smyth*, S. C. Ill., Mount Vernon, Sept. 27, 1884.

9. CARRIERS OF PASSENGERS.—*Injury to Passenger through Collision between Carrier's Vehicle and another Man's Vehicle—Doctrine of Imputed Negligence Denied.*
Where the injury of a passenger by a collision is the result of mutual negligence of the carrier and of the driver of another vehicle, such passenger may recover from the owners of either or both vehicles. Though the plaintiff sue both, he may, ordinarily, dismiss as to either, and, if it be proven that one was not guilty of negligence, he may, on sufficient evidence of negligence, take a verdict against the other. *Tompkins v. Clay-Street Hill R. Co.* S. C. Cal., 4 Pac. Rep. 1165.

10. ———. *Evidence of Negligence in such Case—Res Ipsa Loquitur — No Presumption of Negligence from Fact of Injury.*
In an action by a passenger of one carrier against another carrier, for injury caused by a collision between both, he must prove negligence against the defendant, not presumption of negligence arising against such carrier from the fact of the injury. The defendant would be entitled to an instruction of this nature, and a general instruction that plaintiff must make out his case by a preponderance of evidence, is not equivalent thereto. *Ibid.*

11. COLLATERAL SECURITIES.—*Sale of Collateral Receipt before Maturity of Note.*
In the absence of an agreement to that effect, the holder of a collateral receipt can not sell it before the maturity of the debt for which it is so held. Where oil held as collateral security for the payment of notes is sold without the owner's assent or subsequent approval, before the maturity of the notes, the defendants are liable in trover. *Berg v. Foster*, S. C. Pa., 15 Pittsb. Leg. Jour. N. S. 185.

12. CONSPIRACY TO DEFRAUD UNITED STATES.—*Indictment Need not Set Forth the Means.*
Section 5440 of the United States Revised Statutes makes it a crime to conspire to defraud the United States in any manner, and a count in an indictment is not demurrable because it charges a conspiracy without setting forth the means by which the fraud is to be consummated. *United States v. Gordon*, U. S. Cir. Ct., Dist. Minn., Oct. Term, 1884; 22 Fed. Rep. 250.

13. ———. *Fraudulent Entry of Public Lands—False Affidavits.*
A count in an indictment under Rev. Stat. § 5440, charging a conspiracy to defraud the United States by presenting for approval to the register and receiver of a land-office false and fraudulent affidadavits and proofs of settlement and improvement under the pre-emption law of 28 persons, stating that such persons were entitled to enter public lands, and had severally complied with the pre-emption laws, and had severally entered such lands for their individual benefit, and not for speculation, is sufficient. *Ibid.*

14. ———. *Entry for Speculation.*
A count in an indictment under § 5440 of the United States Revised Statutes, charging a conspiracy to defraud the United States by hiring 28 persons to enter at a land-office, under color of the pre-emption laws, certain public lands of the United States, solely for the purpose of selling the same on speculation to defendant, and L, and some other person to the grand jury unknown, is not demurrable. *Ibid.*

15. CONTRACT.—*By Letter—When Completed.*
A contract by letter is completed the instant that the letter accepting the offer is mailed, and is valid and binding whether letter of acceptance is received or not. *Haas v. Nyers*, S. C. Ill., Ottawa, Nov. 17, 1884.

16. ———. *By Telegraph—When Completed.*
Where anything else is left to be settled in respect to an offer by mail or telegraph, the acceptance of the offer by telegraphing will not complete the contract where the despatch does not reach its destination. A and B contemplated making a large purchase of cattle in the west, and it was agreed that A should go to see the same and telegraph back to B the price per head, if a purchase was made, when B was to reply by telegraph

without delay saying, "yes," if he was willing to take a third interest in the purchase, and then A was to telegraph back to B the estimated amount required to pay a third interest, which B was to place to the credit of A and his brother in a Chicago bank, so that A might draw on the same, and cause the bank to telegraph that fact to A. A bought the cattle for $55,000 and telegraphed B the price per head, and he answered "yes," which despatch never reached A, and later he sent another despatch to A saying if the cattle were good there was no danger in buying them, which was received on the same day that A and another had concluded the purchase by paying the necessary advance. On the next day B arrived and offered to pay his share of the price which was declined. *Held*, that under the circumstances the sending of the first despatch of accepting a share in the purchase, which never reached its destination, did not complete the contract and make A and B partners in the purchase, there being something else to be done besides a mere acceptance to carry out the contract, and also that B's offer to pay on the day after the purchase and payment of the price was too late. *Ibid.*

17. ——. *To make Credit given Depend upon prompt Payment—Declaring Debt due.*

A party gave a promissory note for the principal debt, and his four coupon notes for the annual interest; the principal note provided, "if default in the payment of any interest note, or any portion thereof, for the space of sixty days after the same becomes true and payable, then all said principal and interest notes shall, at the option of the payee, his executors, etc., become at once due and payable without further notice. The trust deed securing the notes contained a similar provision. One of the interest notes not having been paid sixty days after its maturity, the assignee of the notes ordered a sale of the land for the entire debt: *Held*, that it was competent, under the language of the principal note and trust deed, for the assignee to declare the principal note due for the non-payment of the first coupon note for the space of sixty days after its maturity. *Magnusson v. Williams*, S. C. Ill., Ottawa, November 17, 1884.

18. CUSTODY OF CHILDREN.—*Father of Bastard entitled to its Custody as against everyone but Mother.*

Although a bastard may not be looked upon as a child of its father for any civil purpose, the ties of nature are respected in regard to its maintenance, and the putative father is entitled to its custody as against all but the mother. He is, therefore, a proper person to petition the Court for the appointment of a guardian. *Pate's Appeal*, S. C. Pa., 15 Weekly N. Cas. 289.

19. DEED OF TRUST.—*Sufficiency of Publication of Notice of Sale.*

Where a deed of trust authorized a sale of the land named therein for a default of payment, upon first giving thirty days notice thereof, by publication in a newspaper, etc., it was *held*, that a publication on Aug. 23d of a sale which was made on September 22d following was sufficient, the last day named not being a Sunday. Such an instrument does not require there shall be thirty working days between the publication and the sale. *Magnusson v. Williams*, S. C. Ill., Ottawa, Nov. 17, 1884.

20. FORECLOSURE.—*Decree as to Surplus—To Junior Mortgagee without Cross-bill.*

On bill to foreclose a prior mortgage, in case of a sale, the junior mortgagee will be entitled to the surplus after satisfying the first mortgage, upon his answer alone, disclosing his interest, without filing cross-bill. *Armstrong v. Warrington*, S. C. Ill., Ottawa, Nov. 17, 1884.

21. INJUNCTION AGAINST PUBLIC NUISANCE.—*Provision in Final Decree for re-opening same, Erroneous—Interest Reipublicae ut sit Finis Litium.*

It is not the duty of a court to make provision in its final judgment for a re-opening or renewal of a controversy which it closes by its judgment. Therefore where it was adjudged that a plaintiff was entitled to a perpetual injunction restraining certain acts of defendant which amounted to a nuisance, it was erroneous for the court to provide in its judgment for the annulling and setting aside of the decree when it should appear that defendant had provided means for abating such nuisance. Ross, Sharpstein, and McKinstry, JJ., dissenting. *People v. Gold Run, etc., Co.*, S. C. Cal., 4 Pac. Rep., 1150.

22. JUDGMENT NOTES.—*Texas "Iron Clad" Note—Designation of Attorney must be made before Judgment.*

Where suit is brought on a note which authorizes the payor to designate an attorney to appear and confess judgment, etc., for the payee, such designation must be on file when the judgment is rendered or the same is void. Nor can such designation be filed after judgment rendered so as to validify such judgment. *Grubbs v. Blum*, S. C. Tex., Nov. 18, 1884; 4 Tex. L. Rev. 333.

23. JURISDICTION.—*Power of Court over its Judgment after Appeal.*

In Texas the District Court has power over its judgments, notwithstanding an appeal may have been perfected until the term is closed, and that it has full power to vacate or amend the same until the adjournment of the court. (Garza v. Baker, 58 Texas, 488.) The same principle is applicable to a writ of error and the court is authorized to make any proper or appropriate order amendatory of the judgment. *Grules v. Leon*, S. C. Tex., Nov. 18, 1884; 4 Tex. L. Rev. 333.

24. LANDLORD AND TENANT.—*Declarations of one in possession as to his Title not good against his Landlord.*

In a suit by a purchaser at an execution sale against B, it was alleged that B held title to the land by virtue of a bond for title from the vendor of the defendants in the writ. Upon this issue the only proof was the statement of B to that effect while in possession of the land—held insufficient. In action by one holding by deed directly from A, it would be admissible in an action against one claiming through B, to prove B's declarations made while in possession, that he held through an executory contract with A. One holding as tenant, or otherwise, can not, by his own declarations or admissions, affect his landlord's title. *Mooring v. McBride*, S.C. Tex., Nov. 1884; 4 Tex. L. Rev.

25. LIMITATION OF ACTIONS.—*Widow's Right of Action under Missouri Damage Law limited to six Months, unless Minor Children Surviving.*

The Missouri statute giving an action for injuries resulting in death provides that such damages as are here sought to be recovered may be sued for: First, by the husband or wife of the deceased; or second, if there be no husband or wife, or he or

she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead then by the survivor. Mo. R. S., § 2121. It also provides that every action instituted by virtue of the preceding sections of the chapter shall be commenced within the year after the cause of such action shall accrue. *Ibid.* § 2125. The provision contained in § 2121, is held to be merely a limitation or bar to the remedy of the wife, but is a bar to the right itself, if there are minor children, and non-existence of such minor children is held essential, the right of the wife to sue after six months, have expired. Therefore, such an action by a surviving wife commenced more than six months after the death of the husband states no cause of action, unless it states that there are no minor children surviving. *Barker v. Hannibal, etc., Co.*, S. C. Mo., Dec., 1884; St. Louis *Republican*, December 24, 1884.

26. MALICIOUS PROSECUTION.—*Advice of Counsel as bearing on the Questions of Malice and want of Probable Cause.*

In suits fo malicious prosecution the advice of counsel is referable rather to the issue of malice than that of want of probable cause. If the jury can see from all the facts, that the suit was malicious, notwithstanding the advice of counsel, that fact affords no protection to the plaintiff in attachment, and if the court can see that, notwithstanding the advice, it was unreasonable to believe that a ground of attachment existed, that fact of itself does not constitute probable cause. *Brewer v. Jacobs*, U. S. Cir. Ct. W. D. Tenn., March 15, 1884; 22 Fed. Rep. 217, op. by Hammond, J.

27. ———. MALICE.—*Not necessarily Spitefulness, but may be Recklessness.*

Where the action is for the malicious prosecution of an attachment suit without probable cause, malice does not necessarily mean alone that state of mind which must proceed from a spiteful, malignant, or revengeful disposition, but includes as well that which proceeds from an ill-regulated mind, not sufficiently cautious, and recklessly bent on the attainment of some desired end, although it may inflict wanton injury upon another. *Ibid.*

28. ———. DAMAGES.—*Where the Levying of an Attachment on a Crop Scattered the Laborers and Wasted the Crop.*

Where an attachment is levied upon a growing crop of cotton, whereby the tenants and laborers of the plaintiff were so demoralized that they abandoned their crops, from distrust of his ability to carry out his contracts with them for supplies, and the crops were thereby injured, the jury should find their verdict for the actual damages to the crop from this cause, but are not confined to this element, and may assess the damages so as to compensate the plaintiff for the injury; but in no case should this power of the jury operate to make the verdict excessive or oppresstve, *Ibid.*

29. MANSLAUGHTER.—*Sheriff's Deputy Arresting in another County—Reckless Discharge of Gun.*

The sheriff of Clinton county having a bench warrant for the arrest of P, appointed defendant, his deputy, to make the arrest. Defendant arrested P in another county, and in making the arrest, handled a gun with which he was armed, so recklessly that it went off and killed P's companion. Defendant being indicted for murder, *held*, (1.) the bench warrant and endorsement of the sheriff deputizing defendant are incompetent evidence to show that the defendant was acting officially; (2.) a sheriff can appoint a deputy to execute process in the county only, he can confer no power to act in another county; this rule applies alike to civil and criminal process. (3.) An instruction on the law of involuntary homicide was not proper in this case; one who acts recklessly of human life is presumed to intend the consequences of such acts, and if death ensues is guilty of manslaughter. *York v. Commonwealth.*, S. C. Ky., Nov. 1, 1884; 6 Ky. L. Rep. 334.

30. MASTER AND SERVANT.—*Railway Conductor injured by Accidental Discharge of Gun by Station Baggage Master.*

The plaintiff in error, in anticipation of an attack upon its trains by robbers, provided breech-loading shot guns and ammunition for their defense. These guns were placed by the superintendent of the company in charge of the train baggage-master, with instructions to keep the guns unloaded and wrapped up in a blanket, except when passing over that portion of the road where an attack was apprehended. Upon reaching a certain station on the road, the guns were to be unpacked and charged, ready for use; and after passing the same on the return of the train, the cartridges were to be withdrawn, and the guns again wrapped up, and, upon reaching the headquarters of the company, the package was to be delivered to the station baggage-master, to be kept over night, and upon the return of the train, he was to replace the package. The plaintiff, a conductor on the train, who had entire command thereof, and knew of the foregoing regulations, was injured by the accidental discharge of one of the guns when the same were being replaced on the train by the station baggage-master. *Held*, that, whether the company was guilty of negligence in not providing gun racks, or other suitable means for transporting the guns, was a question for the jury; that the plaintiff, as conductor of the train, was charged with the duty of seeing that the instructions of the superintendent were observed; and that the injury resulted from the negligence of a fellow-servant, for which the company was not liable. *Colorado, etc., R. Co. v. Martin*, S. C. Colo. Oct. 31, 1884; 4 W. C. Rep. 563.

31. PARENT AND CHILD.—*Tort of Minor—Damages.*

The responsibility of the father for the damage occasioned by the act of his minor child residing with him, is not affected by the fact that he was momentarily absent from the house at the time of the act. Neither is it affected by the tender age of the minor. The fault, although not legally imputable to the child by reason of his lack of capacity, is imputed by the law itself to the father, as resulting from some defect of care, watchfulness and discipline, in the exercise of the paternal authority. In such case the verdict of a jury in favor of plaintiff, when not manifestly excessive, will not be disturbed as to amount. *Mullins v. Blaise*, S. C. of La., Jan. 5, 1885.

32. PARTNERSHIP.—*Dissolution Acquiescence.*

Where a partner has retained the right to dissolve the partnership at his pleasure, and on a given day orders the books to be balanced for the purpose of ascertaining the interest of the retiring partner,

but, on the completion of that work fails and neglects to pay the sum thus found to be due, and the retiring partner remains in daily attendance and does in the business of the firm precisely what he had always done without remonstrance or complaint of the dissolving partner, the partnership will be held to have continued until this latter has abandoned his position or has been driven from it, or the former has done some overt act signifying that the dissolution has already taken place. *Oteri v. Oteri.* S. C. La., Jan. 5, 1885.

33. PLEADING.—*Plea to Suit on an Award.*

Where matters in dispute were submitted to two arbitrators, under a written agreement that they might call in a third party if they failed to agree, and they did call in a third party, and two of the three made an award, in an action of *assumpsit* upon the award, the defendant pleaded that after the third party was called in to participate in the decision, they, nor either of them, ever appointed any time for hearing the defendant, or his witnesses, or proofs touching the matters referred to them, nor did they afford the defendant any opportunity to be heard; and that the third man so selected signed the award, without hearing the defendant or hearing any evidence: *Held*, no error in overruling a demurrer to the same. *Alexander v. Cunningham*, S. C. Ill., Ottawa, Nov. 17, 1884.

34. ——. *Denial of Knowledge or Information.*

A defendant is not bound to inform himself concerning the truth of an allegation, of which he never had any knowledge, before answering the same; and a denial of any knowledge or information thereof is a sufficient denial, and will not be stricken out as sham unless it plainly appears that the same is false. *Oregonian R. Co. v. Oregon R. & Nav. Co.*, U. S. Cir. Ct., Oregon, Dec. 1, 1884; 22 Fed. Rep. 245.

35. ——. *Frivolous Pleading.*

A frivolous answer or defense is one which contains nothing that affects the plaintiff's case, and may be stricken out on motion; but a motion to strike out for frivolousness is not well taken if the matter included in it is material, if true. *Ibid.*

36. ——*Denial of Corporate Existence—Matter of Estoppel set up by Replication.*

In an action by a corporation on a contract, a denial of its corporate existence goes not only to the disability of the plaintiff, but to the cause of action also, and is therefore a plea or defense in bar of the action, and will be so considered, unless expressly pleaded in abatement. A party who contracts with a corporation, as such, is thereby estopped, in an action on such contract, to deny its corporate existence or power to make such contract; but in case such want of existence or power is pleaded as a defense to such action, the corporation must claim the benefit of the estoppel on the record, or the same will be considered waived. When the matter constituting the estoppel—the compact—does not appear in the previous pleadings, it must be set up by replication; but where the same does so appear, the estoppel must be raised by demurrer. *Ibid.*

37. PRACTICE.—*Instructing the Jury to Find for the Defendant.*

Where there is no evidence tending to prove a material issue of fact on the part of the plaintiff, which is essential to his right to recover, the court may so instruct the jury and direct a finding for the defendant. *Alexander v. Cunningham*, S. C. Ill., Ottawa, Nov. 17, 1884.

38. PRIVATE NUISANCE.—*Injunction against Maintaining Engine Built for Operating Cable Street Railway.*

The maintaining and use on property adjoining plaintiff's, of a steam-engine for the purpose of propelling cars by means of a cable, by which use plaintiff's adjoining building was constantly shaken, plaster cracked, and premises covered with soot, besides a loud and continuous noise being produced, constituted a nuisance for which the street-car company was liable; and a license from the municipality to operate such road, and all machinery necessary thereto, was not a justification of such nuisance. *Tuebner v. California Street R. Co.*, S. C. Cal., 4 Pac. Rep. 1162.

39. REMOVAL OF CAUSE.—*Failure to File Transcript—Second Removal on Ground not Alleged in First.*

If a party exercises his right to remove a case into a Federal court, and, by filing the requisite petition and bond, deprives the State court of jurisdiction, and confers it upon the Federal court, and through his own fault he fails to file the transcript in the United States court, and, after a delay of a year, procures the re-docketing of the cause in the State court, and fully recognizes the jurisdiction of that court, he can not be allowed to remove the cause again to the Federal court on another ground than that first alleged, when his delay is not excused, and it is not shown that such ground did not exist at the time of the first removal. *Pope v. Cheney*, U. S. Cir. Ct., S. D. Iowa, Oct. Term, 1884; 22 Fed. Rep. 177.

40. SALES OF LAND.—*Legal Title in Vendor under Executory Contract—Vendee's Rights.*

A vendor under an executory contract to sell land does not part with the legal title until the purchase money is paid. In such cases the vendee's rights or title to the land, is not affected by the fact that one or all of the notes executed by him, may have been transferred to a third person. *Roussell v. Kirkbride*, S. C. Tex., Nov. 21, 1884; 4 Tex. L. Rev. 329.

41. ——. *Vendor May Defeat Right to Rescind—Lien Continues against Vendor and against Land when—Notice of Lien.*

A vendor may defeat his right to annul such a contract to the prejudice of another, to whom he has transferred notes given to secure the purchase money. The lien would continue against the vendor for the protection of the holder of such notes, and also against the land in the hands of a subsequent vendee, who buys with notice of the lien on the land existing while the land was in the hands of the vendor, or his first vendee. *Ibid.*

42. SUBROGATION.—*Right of, by One Maker of Joint Judgment Note against the Other.*

Where one of two debtor's on a joint judgment-note, which has been duly entered up, pays, under execution, the amount thereof, taking an assignment of record of the judgment to his use, he is entitled to be subrogated to the creditor's rights against the estate of his deceased co-obligor, to the extent that he has paid his co-obligor's proportion of the debt. *Ackerman's Appeal*, S. C. Pa., 15 Weekly N. Cas. 294.

43. TAX SALE.—*Declaration of Nullity—Refunding Price to Purchaser.*

When a tax sale has been declared a nullity, the

purchaser is entitled to recover from the owner the amount in principal, interest and penalties he has paid, unless the assessment of the property was radically defective, or other essential requisite of the law had not been complied with so as to lay the foundation for such penalties; in which last case, only the principal and interest of the taxes so paid by the purchaser can be recovered. *Fishel v. Mercier*, S. C. La., Jan. 5, 1885.

44. TIME.—*Rule for Computing.*

Where thirty days or any other given number of days notice of a sale, is required to be published previous to the day of sale, the rule is to exclude the day of publication, and include the day of sale, but the day of sale must not fall on a Sunday. *Magnusson v. Williams*, S. C. Ill., Ottawa, Nov. 17, 1884.

45. WILL.—*Construction—When a Remainder vests in Beneficiary.*

A testator devised all his property, real and personal, to his executors as trustees, and after providing for the payment of some bequests, gave his widow the right to the use of the income of the trust estate for her life, and his will then provided: "That upon the decease of my wife, said property be held for the use and benefit of my said children (a son and daughter), or their heirs, share and share alike; it being my desire that each one of them, or their heirs, shall have and receive one half of the income therefrom, and that upon their decease, their children to have and receive one half part or portion thereof, or in case they or either of them leave no children or descendants of a deceased child, then that the whole go to the children or descendants of a deceased child or children of my other child." *Held*, that on the death of the widow, each child was entitled to receive one half of the income of the property remaining, and that upon the death of the son, his heirs were not entitled to have one half of the estate paid over to them, but still were entitled to one half the income, and that upon the death of both son and daughter leaving heirs, then their heirs would take the estate *per stirpes*. In such case the trust continued until the death of both the testator's children. *Fussey v. White*, S. C. Ill., Ottawa, Nov. 17, 1884.

CORRESPONDENCE.

A REPLY TO "JUS."

Editor Central Law Journal:

In your issue of Jan. 2d there is a communication over the pseudonym of "Jus." which is an attack on me for "unfairly arraying" the St. Louis "Court of Appeals against the current of authority on simple propositions" in my article upon "The Law of Ratification," which you published Dec. 19th last.

1st. It is charged that I cited several cases as to the terms of "ratification" and "adoption" being synonymous, and then named the case of Barker v. Berry, 8 Mo. App. 449, as asserting a proposition diametric to that supported by the cases first named. By reference to note 5 it will be seen that the citation of the cases was as to the terms mentioned being synonymous without a statement or any intimation on my part whether the decisions named held the words were or were not without a difference in meaning. The case of Barker v. Berry, *supra*,, should have "run in," to use a printe rs expression, with the other cases. The word "*contra*," preceding it is *obviously* superfluous. Without the least intimation by me what was asserted in the other cases, how could it be even conjectured that the case from the Court of Appeals asserted a proposition different from that stated in the former? I have not the manuscript at hand to ascertain whether the printing corresponds with it; the word "*contra*" may have crept in by oversight of printer; however, I will take the mistake on myself.

2d. The following quotation from the gentleman's communication constitutes the second accusation against me: "On page 484 he says: 'It is well settled that the act of an agent, or servant, committed under such circumstances as to render the principal, or master, liable to exemplary damages may be ratified; and the ratification of such an act may be by retaining the agent, or servant in the employ of the principal or master.' Again, after citing numerous authorities, he edds: '*Contra*, Edelman v. St. L. T. Co., 3 Mo. App. 503.' "

The gentleman does not agree with me that the Court of Appeals decided adversely to the proposition, *supra*, as asserted in my article. It is merely a difference of opinion between the gentleman and myself, and as many of your subscribers have not the case at hand, I will quote that part of the court's opinion relative to the question, and the reader may decide whether I am guilty of "unfairly arraying the Court of Appeals against the current of authority."

The case was an action against the St. Louis Transfer Co., and was founded on the alleged gross and wanton recklessness and carelessness of the defendant's servant in driving into plaintiff's wagon. Though not stated in the case, it is to be inferred that the defendant had retained the servant in its employ. The following is all of the opinion relative to the matter in question: "The fact that the defendant did not discharge its driver, after learning of the accident, had no tendency to prove a ratification by defendant of his act. To hold the defendant liable for vindictive damages by virtue of a ratification, the plaintiff must at least prove some affirmative act. Mere negation, or absence of action, can not operate as a ratification in any such case as the present. The fallacy lies in assuming that there was some obligation on the defendant to act, and to conclude itself by its action. If it discharged the driver on account of the accident this would be taken as evidence of its liability; else, it would be argued, why discharge him? If, on the contrary, there is no discharge, a ratification is inferred. This would be to reduce parties to a dilemma to which the law does not drive them. The law can make no distinction between cases which are plain and those which are not plain. An investigation may completely alter the aspect of the case; and it is the right of a party charged to have the investigation made under the safe-guards provided by law. The defendant was entitled to stand on its legal rights, and the plaintiff to stand on his legal remedies, The foreman of the company had no personal knowledge of the accident, and neither by word nor deed sanctioned any wrong doing. It is true, as said in Perkins v. Missouri, Kansas & Texas R. Co., 55 Mo. 214, that slight acts of ratification may be sufficient; but the mere omission to act, when action might compromise the legal rights of a party, is not sufficient. In such cases there is no legal obligation upon the per on to act, and where there is none, inaction can not ratify." Respectfully submitted,

W. A. ALDERSON.

QUERIES AND ANSWERS.

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

6.* A woman owning land in fee simple, married. Children were born of this marriage. The husband, solvent at time of marriage, became insolvent in course of time. Suits were brought on his debts by creditors and judgment had. During the months intervening between the bringing of suit, and the obtaining judgment, husband and wife went into Chancery, and, on petition, her realty was settled on her as a *feme sole* free from debts, liabilities and control, etc., and with power of disposition by deed, will, or otherwise. The wife devised the land to her children and died. The creditors of the husband levied on what they supposed was the life estate of the husband, as tenant by the courtesy. The devisees enjoined the sale, by bill filed for that purpose, and to remove the cloud of the levy from their title. Whose is the better right, creditors, devisees, or children? Land is situated in Tennessee; all the occurrences took place in that State, and it is the domicil of all parties. Answer fully, and give authorities and reasons.

THERLMORE.

QUERIES ANSWERED.

Query 59. [19 C. L. J. 479] A owes B a debt. C colludes with A to smuggle and conceal A's property, whereby B is prevented from collecting his debt out of A. Is C liable for the debt as a result of his collusion with A?

Answer.—If a fraudulent disposition has actually been made by the debtor of his property, a creditor can not, in the absence of special legislation, bring an action in *assumpsit*, or on the case against those who combined and colluded with him. *Assumpsit* will not lie; for there is neither an express promise, nor a privity from which the law will imply a promise to pay the debt of the creditor. An action on the case will not lie, because the damages are too contingent and remote. As a creditor has no special title in or to the property of the debtor, the only proof of loss or injury that he could make, would be that the debtor had fraudulently conveyed it away without receiving value therefor, with the intent to avoid the payment of his demand, and that he had no other means of obtaining payment. Such proof would not entitle the creditor to recover the amount of his debt; for that subsists and may be collected. Nor would he be entitled to recover the amount of the property conveyed; for to that he has no better claim than other creditors. The *ultimatum* of the proof would be to show only that he had been deprived of the chance or possibility of obtaining payment from the property conveyed. Bump on Fraud. Con. (3rd. ed.) pp. 527, 528 and numerous citations. In Cramer v. Hernstadt, 41 Tex. 614, Cramer sued H, to recover the amount of a bill of goods sold him, and set up in his petition, that the defendants, T and S, merchants in Jefferson, had conspired and combined with H to hinder and delay plaintiffs in the collection of their just debts; that they had secretly purchased and conveyed to their (F & S's) store, a quantity of goods from the store of H, and closed with a prayer that all the defendants be held liable jointly and severally to pay plaintiffs the amount of their debt. Defendants, F and S, excepted to the petition, on the ground that it did not allege that they were indebted to, or in anywise connected in business or interest, or as being in any way instrumental in obtaining credit for H, or that there was any privity of contract existing between them, and the other parties to the suit; and that the petition attempted to charge them with a contract, but charged a tort. The trial judge sustained the exception, and upon appeal the court say: The petition showed no privity of contract between F and S, and the other parties to the suit. It was an attempt to blend in one suit, parties liable on a contract for goods sold and delivered, with those who had purchased goods from plaintiff's debtors. But see Clements v. Moore, 6 Wall. Bump cites many well considered cases to sustain his views as set forth in the beginning of this answer, and the reasons adduced in support of the doctrine, seem incontrovertible.

But I venture the assertion that B can recover of C by garnishment. Lamb v. Stone, 11 Pick. 527, was an action on the case by a creditor against one to whom it was alleged the debtor had made a fraudulent sale of his property. The court held that the action could not be maintained; because, 1. If the sale was fraudulent, the property was liable to attachment, after, as well as before, the sale; 2. If the property could not be come at, to be attached specifically, it might be reached in the purchaser's hands by garnishment. See U. S. v. Vaughn, 3 Binney 394. The fundamental doctrine of garnishment is, that the plaintiff does not acquire any greater rights against the garnishee than the defendant himself possesses; but this principle is subject to this exception: Where the garnishee is in possession of effects of the defendant under a fraudulent transfer from the latter, there, though the defendant would have no claim against the garnishee, yet a creditor of the defendant can subject the effects of the defendant in the garnishee's hands to his attachment. Drake on Attach. § 458. Morris v. House, 32 Tex., 492, is a case in point. House & Mather, recovered judgment against Madden. Morris, the appellant, was served with a writ of garnishment, and he denied having any property in his hands belonging to Madden, which answer was contested. The evidence showed Morris to hold certain effects of Madden's under a trust deed, which the jury found to have been executed for the purpose of hindering and defrauding Madden's creditors. The Court say: "Appelant insists that he be discharged, because the jury having found the assignment fraudulent and void, there could be nothing in his hands thereunder. This objection is not well taken. If he did not hold under the deed, he still held it in his own wrong; and the law made him the trustee of an implied trust, which could be reached in his hands by the creditors of Madden, and in the very manner in which it was proposed by garnishment. To the same effect are, Lupton v. Cutter, 8 Pick. 298; Gore v. Clisby, Id., 555; Hopkins v. Ray, 1 Metc. 79; Copeland v. Weld, 8 Maine, 411.

F. M. ETHERIDGE.

Cotton Gin, Tex.

NOTE BY THE EDITOR.—In that part of his answer which is designed to show that B would have a remedy against C by garnishment, our learned correspondent seems to misapprehend the question. The case put, is not the ordinary case of a fraudulent conveyance, by A to C for the purpose of placing the property of A beyond the reach of an execution or attachment sued out by B. But it is a case where C conspires with A to conceal the property of A—possibly by running it out of the state, or committing it to the custody of still another person. The query, as we understand it, does not suppose that C is in possession of A's property, in which case, there is no doubt that B would have his remedy against C for the satisfaction of his judgment against A out of the property by a bill in equity,

or, in some jurisdictions, by a process of garnishment. But the question is this: If a third person maliciously conspires with my debtor to defeat me of the recovery of my debt, does the law give me an action against such third person? The question is a close one; but on the authority of Lumley v. Gye, (2 El. & Bl. 216,) decided in the English Queen's Bench in the year 1853, it is to be assumed that such an action will lie. In that case, it was held, after the greatest consideration, that an action on the case at common law will lie at the suit of A against B for the damage which A may have sustained through the malicious act of B in persuading C to break a contract which subsisted between C and A. The case was that, a celebrated *prima donna* had an engagement to sing for the plaintiff, an opera manager, and the defendant, a rival manager, persuaded her to break her engagement and to sing for him. Analogous cases, of which a great many are found in the English, and some in the American books, are those in which a man entices away another man's servant or apprentice, or even his minor child, the same being his servant, and is held liable to pay to the master or parent the earnings of the child. Walker v. Cronin, 107 Mass. 555; Bixley v. Dunlap, 56 N. H. 456; Plummer v. Webb, 4 Mason, 380; Stowe v. Heywood, 7 Allen, 118; Sherword v. Hall, 3 Sumn. 127; Ames v. Union R. Co., 117 Mass. 541; Noice v. Brown, 39 N. J. L. 569; Woodward v. Washburn, 3 Denio, 369; Jeter v. Blacke 43 Ga. 331. But on the precise point ruled in Lumley v. Gye, *supra*, the American Courts are generally in accord with it. Walker v. Cronin, 107 Mass. 555; Jones v. Stanley, 76 N. C. 355; Haskins v. Royster. 70 N. C. 601; Dickson v. Dickson, 33 La. An. 1261. Compare Burgess v. Carpenter, 2 Rich. S. C. (Law) 7.

ANOTHER ANSWER.—The case of Nussbaum & Dannenberg v. Helbion, 63 Ga. 312, answers this question in the affirmative.

S. B. A.
Savannah, Ga.

JETSAM AND FLOTSAM.

TOO MANY OF THEM.—It is said that there are 5880 lawyers, 2760 notaries, and 750 commissioners of deeds in the city of New York.

CANADIAN INDEXING.—In the alphabetical index of the Statutes of Ontario down to 1884 occurs the following entry: 'Reside with respectable persons, children may be permitted to. See Industrial Schools, 1884.'

A NEW CLASSIFICATION OF CRIMES.—The new penal code of Holland, which has been long in preparation, and which was recently enacted, contains what strikes a student of the common law as a new classification of crimes, although we are not sure that it is new to the civil law. It divides crimes into two classes, *delits* and *contraventions* or natural and conventional wrongs. These classifications correspond to the common law classifications of *mala in se* and *mala prohibita*.

DEFECTS IN THE LAWS.—In his annual message, Gov. Martin talks plainly to the legislature of Kansas, thus: "Many defects in our laws have arisen from haste and want of care on the part of the Legislature. Acts have frequently been passed purporting to amend certain sections of the General Statutes of 1868, for example, which had been amended and repealed years before. Sometimes the acts intended to be repealed, are otherwise improperly cited, as in chapter 37 of the Session laws of 1883, relating to cities of the third class. And, notwithstanding the strict requirement of the Constitution, the titles of some acts are so indefinite that no person but their author can tell the subject of the legislation by reading them. Such errors and defects are often very mischievous in their consequences, and it is to be hoped that no mistakes of this character will mar the Session Laws of 1885." A few copies of Mr. Simon Sterne's essay on "Slipshod and Defective Legislation," read before the American Bar Association, might be distributed with profit in several of our state legislatures.

A WILL AS IS A WILL.—The following is a literal copy of a will on record in the Clerk's office at Covington, Indiana: "May 29. William Lawless, in the state of death, at James Moran's LaFayette Tippecanoe County, Indiana, William Lawless makes his will to James Moran for pays his debts after his death, State of Michigan that in or at the Grand Rapids, which I leave to James Moran having no father or Mother, Sister or brother but James Moran, which I will him 80 Acres of land having no one but Myself. I, William Lawless requesting of you James Moran at this our of my death to see my deaths paid and every expense that follows me. I request of you James Moran to pay all my debts which I give you account of, I William Lawless on my death bed to see

David Price,	(Paid)	15 c.
Thomas McCrew,	(Paid)	10 c.
John Murphy,	(Paid)	5 c.

"I request of you James Moran by William Lawless to get six masses said for me and my brother James Lawless which is my last words to you James Moran six masses one for each of us two for myself William Lawless. WILLIAM LAWLESS."
"1830."

PROVING THE LAW OF A FOREIGN COUNTRY TO A JURY.—An anomalous and unsatisfactory piece of practice, which we think might well be amended, was illustrated at the beginning of this week in one of the earliest of the London actions. The defense to an action on a promissory note, raised a question of Argentine law, and in the usual course, a gentleman, who had practiced law in the Argentine Republic, was called to elucidate this obscure subject. The result was an aggravated case of *obscurum per obscurius*. The gentleman in question, though doubtless an expert lawyer, was but an imperfect master of the English language, and his knowledge of English legal terms and technicalities appeared to be absolutely *nil*. To make matters worse, he was the only available exponent of the jurisprudence of his native land in London, and plaintiffs and defendant had each competed for such assistance as he could afford their case. It is not too much to say, that by the time this gentleman had been examined and cross-examined for a couple of hours, the jury knew about as much of the laws of the Argentine Republic as of those of Fiji, and but for the parties being able to agree on a translation of portions of the Argentine Code which were put in as supplementary evidence, the verdict would have been given quite as much upon matter of imagination as upon matter of fact. At the best of times, there is something highly irrational in leaving a body of laymen to decide questions of foreign law often of great technicality and intricacy. It would be more just and more expedient to leave these questions to be determined in the usual way by the judge, upon such properly authenticated evidence of the law in question as is always readily accessible.—*Law Times* (London).